No. 76-878

In the Supreme Court of the United States

OCTOBER TERM, 1976

EDWARD W. MAHER, COMMISSIONER OF SOCIAL SERVICES FOR THE STATE OF CONNECTICUT, APPELLANT

v.

DONNA DOE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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CITATIONS

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This submission is made in response to the Court's invitation to the Solicitor General to file a brief on behalf of the United States as *amicus curiae*.

QUESTION PRESENTED

The United States will discuss the following question:

Whether a state may deny AFDC benefits to an otherwise eligible family because of the mother's refusal to cooperate with the state's efforts to establish her children's paternity and to secure support payments from the father, before the Secretary of Health, Education, and Welfare promulgates regulations establishing standards for excusing such cooperation.

STATEMENT

1. Section 52-440b, Conn. Gen. Stat. Ann. (1976 Cum. Supp.), requires the mother of a child who was born out of wedlock and on whose behalf welfare benefits are received to disclose the name of the putative father and institute a paternity action against him. Noncompliance constitutes civil contempt punishable by a fine of up to two hundred dollars and imprisonment for up to one year.

Appellees are unwed mothers who receive welfare benefits on behalf of their illegitimate children. They brought this action for injunctive and declaratory relief in the United States District Court for the District of Connecticut, alleging that Section 52-440b is inconsistent with the Social Security Act and deprives them of their constitutional rights to due process, equal protection, and privacy.[1] A three-judge district court rejected their claims and upheld the statute in all respects. *Doe* v. *Norton*, 365 F. Supp. 65 (D. Conn.). This Court noted probable jurisdiction. *Roe* v. *Norton*, 415 U.S. 912. Without reaching the merits of the case, however, the Court vacated the judgment of the district court and remanded for further consideration in light, *inter alia*, of intervening amendments to the Social Security Act. *Roe* v. *Norton*, 422 U.S. 391, 393.

2. Those amendments[2] added to Title IV of the Social Security Act a new Part D, providing for federal financial and technical assistance to approved state child support

[1]Appellees sued on their own behalf, on behalf of their children, and on behalf of a class of similarly situated women in the state who had been threatened with or cited for contempt under the statute.

[2]We have explained the statutory scheme at length in our brief in opposition in *Coe* v. *Califano*, No. 76-999, pending on petition for a writ of certiorari.

programs. 42 U.S.C. (Supp. V) 651-660. States electing to participate in the program must create a new agency (the "IV-D agency") that will undertake to establish the paternity of, and secure support payments for, any child for whom benefits are claimed under Part A of Title IV, the program of Aid to Families with Dependent Children ("AFDC"). 42 U.S.C. (Supp. V) 654(4).

Congress simultaneously amended the AFDC program to provide that state plans must require, as a condition of eligibility, that aid applicants or recipients cooperate with the state IV-D agency's efforts to establish paternity and secure support payments. 42 U.S.C. (Supp. V) 602(a)(26). The recipient's cooperation is excused, however, if the state agency administering the AFDC program (the "IV-A agency") finds, "in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the child," that there is "good cause" for the recipient's refusal to cooperate. 42 U.S.C. (Supp. V) 602(a)(26)(B). Similarly, the enforcement obligations of the state IV-D agency are subject to exception if the IV-A agency has determined in accordance with the Secretary's standards that compliance would not be in the child's best interests. 42 U.S.C. (Supp. V) 654(4).

These amendments became effective on August 1, 1975.[3] Congress provided, however, that the "good cause" regulations to be prescribed by the Secretary would not become effective until sixty days after being submitted to Congress.[4] The Secretary has promulgated regulations implementing the mandatory recipient cooperation and state enforcement requirements added by the amendments.

[3] Pub. L. 94-46, Section 2, 89 Stat. 245; Pub. L. 94-88, Section 210, 89 Stat. 437.

[4]Pub. L. 94-88, Section 208(d)(1), 89 Stat. 436.

45 C.F.R. Parts 232, 301-304. He also has published proposed "good cause" regulations (41 Fed. Reg. 34298), but those regulations have not been submitted to Congress and are not yet in effect.

3. On remand, the three-judge district court ruled that abstention was not required (J.S. App. A, pp. 10a-20a)[5] and reaffirmed its prior holding that Section 52-440b is constitutional (*id.* at 29a). It also held that the new federal enactments did not in general preempt the state statute, since both shared a common goal of establishing the paternity of and securing support payments for illegitimate children. The court did, however, enjoin appellant from beginning or continuing contempt proceedings under Section 52-440b, or from removing unwed mothers from the AFDC rolls for noncompliance with the cooperation requirement imposed by 42 U.S.C. (Supp. V) 602(a)(26), unless appellant first determines that the "good cause" exception of Section 602(a)(26) does not apply (J.S. App. A, p. 31a).

DISCUSSION

We submit that until the Secretary's "good cause" regulations are in effect the state should enforce the Part IV-D paternity and child support program except where the state concludes, pursuant to its own *ad hoc* determination of "good cause," that it would not be in the child's best interests to do so. Although we disagree with appellant's contention (J.S. 8-15) that 45 C.F.R. 303.5 establishes interim "good cause" regulations, the absence of presently effective regulations is not a bar to the states' enforcement of the new legislation.

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[5]In its order vacating and remanding, this Court had directed the district court further to consider its decision in light of *Younger* v. *Harris*, 401 U.S. 37, and *Huffman* v. *Pursue*, 420 U.S. 592. *Roe* v. *Norton*, *supra*, 422 U.S. at 393.

1. 45 C.F.R. 303.5 is one of several regulations that the Secretary had promulgated to implement the IV-D agency's enforcement responsibilities before Congress had added the "good cause" exception to the mandatory recipient cooperation and state enforcement requirements of the legislation.[6] That regulation provides that the IV-D agency need not attempt to establish paternity in cases involving incest, rape, or pending adoption proceedings "if, in the opinion of the IV-D agency, it would not be in the best interests of the child to establish paternity." It says nothing about the IV-D agency's responsibility to enforce support obligations in cases "in which the obligation to support and the amount of the obligation have been established" (45 C.F.R. 303.6). Nor does it say anything about the IV-A agency's responsibility to determine whether there is "good cause" for excusing an unwed mother from the cooperation requirement, or about the IV-D agency's paternity or support enforcement obligations in light of such a determination by the IV-A agency. In short, 45 C.F.R. 303.5

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[6]In its original form, the federal legislation establishing the Title IV-D state enforcement program and amending Title IV-A to provide for recipient cooperation did not contain a "good cause" exception. See Pub. L. 93-647, 88 Stat. 2337. Shortly before the scheduled effective date of July 1, 1975, Congress postponed the effective date to August 1, 1975 (Pub. L. 94-46, Section 2, 89 Stat. 245) and thereafter added the "good cause" exception (Pub. L. 94-88, 89 Stat. 433, 436). The regulations implementing the IV-D state enforcement program, 45 C.F.R. Parts 301-304, also were initially scheduled to take effect on July 1, 1975 (40 Fed. Reg. 27157-27169); their effective date was postponed to August 1, 1975, to reflect the altered effective date of the legislation itself (40 Fed. Reg. 31766-31767), but they were not (and have not yet been) amended to reflect the good cause exception subsequently added to the legislation.

was never intended to be an interim substitute for regulations by the Secretary under Part IV-A.[7]

2. Even though there are no "good cause" regulations currently in effect under Part IV-A, it does not follow that, in the interim, the states should either forego implementation of the recipient cooperation and state enforcement provisions of the legislation, or enforce those provisions without regard to the best interests of the children involved in individual cases. Either of those alternatives would defeat Congress' intent.[8] Accordingly, the Secretary has taken the

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[7]Nor do we agree with appellant's contention (J.S. 15-16) that the district court held 45 C.F.R. 303.5 invalid. The court never mentioned that regulation, and its judgment does not prohibit the Part IV-D agency from attempting, with or without the recipient's cooperation, to establish paternity (the obligation to which 45 C.F.R. 303.5 applies) or to secure support payments.

Appellant correctly notes (J.S. 9-11) that the district court's judgment applies not only to Section 52-440b, but also to Section 404.6 of the regulations of the Connecticut Department of Social Services (J.S. App. D), which provides, *inter alia*, that an unwed mother who refuses to name the putative father of her illegitimate child will be cited to appear before the Court of Common Pleas and compelled to do so, and in addition will be declared ineligible for assistance. Section 404.6 as originally promulgated is no longer in effect, having been amended by appellant to comply with his understanding of the court's decision. See J.S. App. G.

[8]Congress clearly believed that the establishment of paternity and securing of support payments would be in the best interests of the child in most cases. S. Rep. No. 93-1356, 93d Cong., 2d Sess., pp. 42-44, 48-52 (1974). To postpone enforcement of the mandatory recipient cooperation and state enforcement aspects of the legislation until the Secretary's "good cause" regulations become effective therefore would frustrate the legislative will that illegitimate children enjoy the benefit of those provisions as of August 1, 1975. At the same time, enforcement of those provisions without regard to the "good cause" exception would frustrate Congress' desire to assure that enforcement would not be undertaken in the limited number of cases where the child's best interests are to the contrary.

position that until his regulations become effective[9] the states, "on a case by case basis, should utilize care and common sense in administering the program so that children and their custodial parents or caretaker relatives will not be harmed as a result of cooperating with the State in establishing paternity or obtaining support."[10] In other words, the states should make their own "good cause" determinations until the federal regulations are in effect.[11]

3. Whether the district court's judgment permits appellant to make "good cause" determinations is unclear. Appellant believes that the court has enjoined him from enforcing the new legislation in any respect (or from

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[9]We are advised by the Secretary that he anticipates submitting "good cause" regulations in final form to Congress within as soon as two months, but in any event within the calendar year.

[10]J.S. App. F, pp. 48a-49a (letter of July 30, 1976, from Charles C. Gentile, Acting Regional Director, Office of Child Support Enforcement, Region I, to Vincent Capuano, Chief of Eligibility Services, Connecticut Department of Social Services); see also *id.* at 45a (memorandum of November 21, 1975, from HEW Acting Director, Office of Child Support Enforcement, to Elmer W. Smith, Acting Regional Director, Office of Child Support Enforcement).

Although the foregoing documents refer explicitly only to the IV-D agency's responsibilities, we are advised by the Secretary that HEW also takes the position that the IV-A agency should not declare an unwed mother ineligible for assistance for a failure to cooperate with state enforcement efforts unless that agency has first made a determination that there was no "good cause" for the failure.

[11]The State of Alaska, appearing as *amicus curiae*, states (Br. 4) that "HEW has advised Alaska and other states that they are not free to adopt their own 'good cause' standards pending promulgation of the mandated HEW standards." That statement is correct as far as it goes, but it does not go far enough. Under 42 U.S.C. (Supp. V) 602(a)(26) only the Secretary is authorized to establish "good cause" regulations of general applicability. In the interim, however, the states may follow the Secretary's advice and apply *ad hoc* "good cause" exceptions on a case by case basis.

enforcing Section 52-440b) until the Secretary's regulations are promulgated and approved.[12] There is language in the opinion supporting this view: the court said (J.S. App. A, p. 30a) that "[t]he defendants are required to comply with such regulations as the Secretary of HEW shall issue (including the right to a fair hearing) before continuing with the contempt proceedings against these plaintiffs."

Yet, the court directed (J.S. App. A, p. 30a n. 20) that appellant should "postpone any enforcement [of the recipient cooperation requirement] until the new regulations have been issued and approved" *only* if he finds that "he is unable to determine without the aid of specific regulations that his proposed enforcement action is not against the best interests of the child." This qualification indicates that the court correctly construed the statutory scheme to permit the states, at least in most situations, to make their own "good cause" determinations until the Secretary's regulations are in effect. If the district court intended to reach such a result, then in our view its judgment should be affirmed. If, on the other hand, appellant's reading of the opinion is correct, then the judgment should be reversed. Since, however, either interpretation of the court's opinion is as plausible as the other,[13] with the result that the decision is fatally ambiguous with regard to the central issue presented, we suggest that the Court should vacate the judgment of the district court and remand for clarification.

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[12]Appellees also appear to subscribe to this interpretation of the court's opinion. See Appellee Mothers' and Children's Motion to Dismiss or Affirm, pp. 5, 10, 15.

[13]For that reason it is impossible to determine whether, as the State of Alaska maintains (Br. 5-6), the decision conflicts with *Coe* v. *Califano*, No. 76-999, *supra*, holding that enforcement of the recipient cooperation and state enforcement aspects of the new legislation need not be postponed until the Secretary's regulations are in effect.

4. That course is especially appropriate in this case in light of the enactment by Connecticut of P.A. 76-334, February Session 1976.[14] Section 3 of that Act (Section 17-82b, Conn. Gen. Stat. Ann. (1976 Cum. Supp.), provides in pertinent part:

> All information required to be provided to the commissioner as a condition of such eligibility [for welfare assistance] under federal law shall be so provided by the supervising relative, provided, no person shall be determined to be ineligible if the supervising relative has good cause for the refusal to provide information concerning the absent parent or if the provision of such information would be against the best interests of the dependent child or children, or any of them. The commissioner of social services shall adopt by regulation * * * standards as to good cause and best interests of the child. Any person aggrieved by a decision of the commissioner as to the determination of good cause or the best interests of such child or children may request a fair hearing in accordance with the provisions of sections 17-2a and 17-2b.

The foregoing statute on its face does not indicate what effect, if any, it may be expected to have on the state's enforcement of Section 52-440b, and appellant does not mention the statute or explain its potential effect. In view of appellant's previous enforcement of Section 52-440b in tandem with the state's welfare program, however (see note 7, *supra*), it is at least likely that the new statute may have been intended by the Connecticut legislature to produce a

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[14]The district court's decision was rendered on June 1, 1976. P.A. 76-334 became effective June 2, 1976. The court's judgment was entered on June 17, 1976 (J.S. App. B). There is no indication that the district court was aware of P.A. 76-334.

result similar to that intended by the district court. In those circumstances the controversy would be moot: appellant would be unable to complain of a district court judgment that ordered him to do no more than his own legislature had commanded.

"This Court must review the District Court's judgment in light of presently existing Connecticut law, not the law in effect at the time that judgment was rendered." *Fusari* v. *Steinberg*, 419 U.S. 379, 387. Since P.A. 76-334 appears to bear directly on the issues involved, and since the Court "can only speculate how the new system might operate" (419 U.S. at 388-399), the Court should, as it did in *Fusari*, vacate the judgment of the district court and remand for reconsideration "in light of the intervening changes in Connecticut law" (*id.* at 390).[15]

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[15]On remand the district court also will be able to consider appellant's claim (J.S. 18-20)—which is also the subject of a motion that appellant states is now pending before that court (*id.* at 19)—that the district court's judgment was overbroad insofar as it enjoined appellant from enforcing Section 404.6 of his regulations (which, as noted, has now been amended) with respect to unwed mothers who are willing but unable to name the putative father of their illegitimate children.

CONCLUSION

The judgment of the district court should be vacated and the case remanded for clarification and for further consideration in light of P.A. 76-334.

Respectfully submitted.

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